Supreme Court, U. S.
FILED
OCT 2 1980
MICHAEL RODAK, JR., CLERK

No. 80-151

In the Supreme Court of the United States

October Term, 1980

ALTUS NEWSPAPERS, INC., an Oklahoma Corporation d/b/a ALTUS TIMES DEMOCRAT, BOB GILMORE, SANDRA HART, and CRAIG HARRIS,
Petitioners (Defendants),

vs.

BILL AKINS,
Respondent (Plaintiff).

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

KEITH MYERS
(*Counsel of Record*)
MYERS, MOLLISON & WEBER
Suite 400, NBC Building
Altus, Oklahoma 73521
405-482-1975
Attorney for Respondent

October, 1980

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

TABLE OF CONTENTS

Concise Statement of the Case 1

Stage of Proceedings Where Federal Questions Were Raised 4

Reasons for Refusing the Writ 9

Conclusion 14

TABLE OF AUTHORITIES

Basden v. Mills, Okl., 472 P.2d 889 (1970) 5

Beckley v. Hanks, 389 U.S. 81 (1967) 12

Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974) 14

Curtis Publishing Company v. Butts, 388 U.S. 130, 18 L.Ed.2d 1094, 87 S.Ct. 1975 (1967) 12, 13

Hames v. Anderson, Okl., 571 P.2d 831 (1977) 6

Henslee v. Monks, et al., Okl., 571 P.2d 440 (1977) 13

Herbert v. Lando, 435 U.S. 922, 99 S.Ct. 1635, 55 L.Ed. 2d 515 (1979) 9

McKee v. Neilson, Okl., 444 P.2d 194 (1968) 6

Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971) 11

New York Times Company v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) 3, 4, 7, 8, 9, 15

Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971) 14

Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 91 S.Ct. 1811 (1971) 12

St. Amant v. Thompson, 390 U.S. 727 (1968) 14

Time, Inc. v. Firestone, 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976) 10, 11, 13

Time, Inc. v. Hill, 385 U.S. 374 (1967) 13

Wat Henry Pontiac v. Pitcock, Okl., 301 P.2d 203 (1956) 7, 8, 13

Title 12, O.S. (Laws 1969) §578 6

50 American Jurisprudence 2d, §455 9

No. 80-151

In the Supreme Court of the United States

October Term, 1980

ALTUS NEWSPAPERS, INC., an Oklahoma Corporation d/b/a ALTUS TIMES DEMOCRAT, BOB GILMORE, SANDRA HART, and CRAIG HARRIS,
Petitioners (Defendants),

vs.

BILL AKINS,
Respondent (Plaintiff).

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

CONCISE STATEMENT OF THE CASE

On August 15, 1974, Defendants published a front page news story wherein it was alleged that the Plaintiff-Respondent, a city police officer, had kidnapped a youth at gunpoint, and engaged in an altercation with another law officer. (Refer to the Article reprinted verbatim in Appendix A of the Petitioners' Writ of Certiorari.)

After the Plaintiff-Respondent made a written demand for retraction of the story, the Defendants' engaged the

services of a private investigator to ascertain the facts. On August 28, 1974, as a result of the investigation, a follow-up story was published wherein the Defendants admitted that the portion of the August 15, 1974 story pertaining to "gunpoint" was erroneous. The balance of the August 15, 1974 story was enlarged upon.

The Defendant, CRAIG HARRIS, who was the reporter that compiled and submitted the story for publication, testified at trial substantially as follows: That he first heard of the incident which gave rise to the story of August 15, 1974, while he was standing somewhere in the hall of the Sheriff's office, a distance of approximately 25 feet from where a telephone call had been received by one of the under-sheriffs; he could not identify the under-sheriff that had received the telephone call as that individual's back was to the reporter at the time, and the witness only overheard one side of the conversation which in essence was that there was an incident or that something was happening at Blair, Oklahoma (T. 116, 117, 118, 119).

Although the reporter stayed at the Sheriff's office until the early morning hours of August 15, 1974 (T. 126), he did not discuss the incident, either with the officer who had received the telephone call or other officers who had gone to the scene of the incident or any other person (T. 122, 123). By 8:30 a.m. of August 15, 1974, the reporter had submitted to his supervisor, the Defendant, SANDRA HART, a list of the possible stories for the August 15, 1974 publication, and this story was on said list (T. 132). Although there were many individuals involved in this incident, the reporter testified that neither he nor anyone on his behalf drove to Blair, a small town located approximately 8 miles North of the city of Altus, Oklahoma, to interview any of the principals involved

in the incident (T. 134); the reporter, prior to the writing and submission of the story for publication, did not speak with the Plaintiff or Haskell Lane (eyewitness) in person or by phone, both of whom reside in the City of Altus, Oklahoma; nor did he speak with any of the officers involved in the incident (T. 136). Sometime during the morning of August 15, 1974, prior to publication, the reporter again was privy to one side of a telephone conversation between the Assistant District Attorney and the District Attorney, but again merely relied upon his having overheard one side of a telephone conversation in progress (T. 148-152). This reporter finally admitted that he, on August 15, 1974, talked to no one concerning the verification of the contents of the defamatory article which was published of and concerning the Plaintiff on that date (T. 155, 156).

The reporter's original draft of the story, if one ever existed, was presumably destroyed (T. 160, 161).

It was stipulated between the parties that the *New York Times* rule would apply in this case, and the Court instructed as follows:

> "(3C) The Plaintiff was at the time of the printed article and still is a member of the Altus Police Department, and as such, he was at that time, a public officer, and you are to consider him so during your deliberations. His conduct in the discharge of his official duties is a matter of public interest. Freedom of the press and of speech and discussion upon a subject in which the public has an interest, such as the conduct of a public officer of his official duties, is a right guaranteed by the constitution of our country. The constitutional principle is based upon the principle of open debate and discussion on all public matters, and does not turn on the truth of the published statement

or of the kind appearing in this case. The Defendants have a constitutional right to publish the article in question here. Even if you find the article contains false or unverified statements as to truth or falsity, and even if you find the article is libelous as to the Plaintiff, nevertheless, the Plaintiff may not recover damages from the Defendants unless he has proved by CLEAR AND CONVINCING EVIDENCE that the publication of the article was actuated by actual malice, that is, with knowledge that it was false or that it was published with a reckless disregard of whether it was false or not."

On the 28th of March, 1975, a jury, by an eleven to one vote, returned a verdict for the Plaintiff assessing $5,000.00 actual damage and $15,000.00 punitive damages against all of the Defendants. From this verdict and judgment, the Defendants appealed.

STAGE OF PROCEEDINGS WHERE FEDERAL QUESTIONS WERE RAISED

The Petitioner, under this heading, discusses the burden of proof which the jury was instructed that the Plaintiff must sustain in order to recover. This Honorable Court is advised that at no time were any objections made to the instructions that they were given in this case. The Oklahoma Supreme Court has reviewed the instructions and was satisfied that constitutional rights of the Defendants in this case were jealously guarded by reason of the jury instruction setting out the *New York Times* standard of "Clear and convincing evidence".

A challenge as to the sufficiency of the evidence and a Motion for a directed verdict at the close of Plaintiff's case would not serve to preserve objections to jury instructions.

On appeal to the Oklahoma Supreme Court, Defendant-Petitioner herein urged as follows:

> PROPOSITION I - The opinion and order of this Court is wholly inconsistent with controlling decisions of the United States Supreme Court and prior decisions of this Court.
>
> PROPOSITION II - Appellants are entitled to judgment herein as a matter of settled constitutional law, and:
>
> A. This Court must apply the correct evidentiary test in determining if Akins' evidence is sufficient to meet the required constitutional standards.
>
> B. Akins' evidence fails to meet the constitutional standards promulgated by the United States Supreme Court.
>
> C. The Trial Court erred in failing to enter judgment as a matter of law in favor of the Appellants.

The question of sufficiency of the instructions to the jury simply was not raised at trial or on appeal to the Oklahoma Supreme Court. Unless there is fundamental error in the instructions, then the same will not be disturbed on appeal. In the case of *Basden v. Mills,* Okl., 472 P.2d 889 (1970), the Oklahoma Supreme Court was considering the same proposition as the Petitioner asserts in this case. At page 895 of the opinion the following rule was enunciated:

> "In Defendant's remaining propositions, he complains of various instructions given by the Court, and of the submission of various issues to the jury in such instructions. As we have noted, Defendant did not object to any instruction given, and did not present any proposed instruction for the Court's consideration. It

> is well settled that under such circumstances this Court will review the instructions only to determine whether they are free of fundamental error; *Shayler v. West,* 199 Okl. 386, 185 P.2d 957. Nevertheless, because the judgment in this case includes a substantial amount for punitive damages, we have given careful attention to these propositions, and we cannot say that fundamental or prejudicial error was committed."

In Oklahoma, Title 12 O.S. (Laws 1969) §578, requires that the Court furnish copies of all proposed instructions to the Plaintiff and the Defendant prior to the time they are given to the jury. Each party then has the opportunity to dictate their objections to any instruction into the record outside the hearing of the jury. The Oklahoma Supreme Court has said that one purpose of this Statute is to inform the Court of any defect or irregularity in the instructions so that the Court will have the opportunity of correcting any instructions. *McKee v. Neilson,* Okl., 444 P.2d 194 (1968).

The procedure required by 12 O.S. §578 was followed in the case at bar. Both sides had ample opportunity to object to defective or repetitious instructions as well as submitting to the Court requested instructions. Under this fair and judicious proceeding a party will not be heard to complain of the instructions unless there has been fundamental error. In *Hames v. Anderson,* Okl., 571 P.2d 831 (1977), the Plaintiff brought suit for slander. From a verdict for the Plaintiff of $1,000.00 in actual damages and $7,500.00 in punitive damages, the Defendant appealed asserting that the instructions were erroneous. The Court's response is found at page 833:

> "Nor did Anderson object to the 'now complained of' instruction. Rather, the record affirmatively shows Anderson's attorney refused comment or to raise an

objection to the trial court's instruction in an in camera hearing prior to instructing the jury. No requested instructions are argued or found in the appeal record. Absent fundamental error, objection to the instructions was waived. *Wat Henry Pontiac v. Pitcock,* Okl., 301 P.2d 203 (1956)."

The constitutional standard required by *New York Times Company v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), was clearly and succinctly stated to the jury in Instruction 3C, supra.

Further, to illustrate that there was no fundamental error committed in the instructions in this case, please consider Instruction number (3F) which was given to the jury as follows:

"You are instructed as a policeman for the City of Altus, Oklahoma, the Plaintiff, Bill Akins is a public official. Law enforcement is a primary function of local government and the public has an interest and right to information and not only the qualifications, but also the conduct of law enforcement officers at the 'on the street' level. The abuse of a policeman's office can have great potential for social harm; hence, public discussion and public criticism directed toward the performance of that public office is relevant for publication.

"Because of the legitimate public interest in all law enforcement officers and their conduct, newspaper reporting of their activities is encouraged. If a false statement is published concerning an officer, but it is done in good faith, the officer may not recover damages. Only in the event that an officer proves that a statement was published with *actual malice* may the officer recover damages." (T. 746, 747).

The Oklahoma Supreme Court in the opinion denying the Petitioners' Application for Rehearing, entered an Order on May 12, 1980, articulating the clear and convincing evidence rule as required by the *New York Times* case. Oklahoma has adhered to the *New York Times* standard which required the Plaintiff in this case to prove actual malice by clear and convincing evidence.

The Petitioners assert that the Writ should be granted and the Oklahoma Supreme Court reversed due to the state Supreme Court's ruling that upon examining the records, they found competent evidence reasonably tending to support the verdict, and further found and advised that they do not weigh the evidence. The state Court citing *Wat Henry Pontiac v. Pitcock,* Okl., 301 P.2d 203 (1956), stated that in a law action the verdict of a jury is conclusive as to all disputed "competent evidence" reasonably tending to support the verdict of the jury, the Court would not disturb its verdict and judgment based thereon.

Contrary to the assertion by the Petitioner that the Oklahoma Supreme Court refused to examine the record in the case, it appears from the opinion that the record was examined and competent evidence found. The opinion further stated:

> "The scope of this review is limited. We need only to determine if 'there is any competent evidence reasonably tending to support the verdict'."

A review of the record in the case was absolutely essential for the Oklahoma Supreme Court to arrive at the above findings.

REASONS FOR REFUSING THE WRIT

Under the New York Times rule and its progeny, to be liable, the alleged defamer of public officials, must know or have reason to suspect that his publication is false. But given the required proof, damages awarded for defamation abridges neither freedom of speech nor freedom of the press. *Herbert v. Lando,* 435 U.S. 922, 99 S.Ct. 1635, 55 L.Ed.2d 515 (1979).

In the case at bar, the evidence as partially set out in the statement of facts, supra, discloses that there was plenty of reason and evidence upon which the jury could base its conclusion that the Defendants knew or had reason to suspect that the publication was false.

In the *Lando* case, supra, it was held that the Plaintiff may show the existence of actual malice in many ways. In note 12, page 1643, this Court cited 50 Am Jur 2d §455, where it was stated that the existence of malice may be shown by:

> ". . .; or that the Defendant had failed to make a proper investigation before publication of the statement in question."

Such is the case at bar. The evidence led to the overwhelming conclusion that no investigation was conducted by the reporter prior to the publication of the defamatory article.

While the United States Supreme Court has consistently, since the New York Times standard, insisted that Defendant's First and Fourteenth Amendment rights be jealously guarded, it has also reiterated that the individual's interest in his or her reputation is also a basic con-

cern. *Time, Inc. v. Firestone,* 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976).

Rule 17, RULES OF THE SUPREME COURT, adopted on April 14, 1980, effective June 30, 1980, states:

> "CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI
>
> 1. A review on Writ of Certiorari is not a matter of right, but of judicial discretion and will be granted only when there are special and important reasons, therefore. . ."

The Petitioner in this case cites as its special reason that a constitutional question involving First and Fourteenth Amendments to the United States Constitution is involved. The United States Supreme Court, speaking through Mr. Justice Rehnquist, stated in *Time, Inc. v. Firestone,* supra, at page 463:

> "It may be argued that this is sufficient indication the Court found Petitioner at fault within the meaning of *Gertz.* Nothing in that decision or in the First or Fourteenth Amendment requires that in a libel action an Appellate Court treat in detail by written opinion all contentions of the parties, and if the jury or trial judge had found fault in fact, we would be quite willing to read the quoted passages affirming that conclusion.
>
> ". . . Even where a question of fact may have constitutional significance, we normally accord findings of state Courts deference in reviewing constitutional claims here. See, e.g. *Lyons v. Oklahoma,* 322 U.S. 596, 602-603, 64 S.Ct. 1208, 1212-1213, 88 L.Ed. 1481 (1944), *Gallegos v. Nebraska,* 342 U.S. 55, 60-61, 72 S.Ct. 141, 144-145, 96 L.Ed. 86 (1951) (Opinion of Reed, J.). But

> that deference is predicated on our belief that at some point in the State proceedings some fact finder has made a conscious determination of the existence or non-existence of the critical fact. . ."

The above excerpt from the *Firestone* case is indicative of the United States Supreme Court's reluctance to interfere in the orderly judicial process of the several states.

In refusing to review the record in the *Firestone* case to make a determination of fault, the United States Supreme Court was in effect stating that it cannot sit as a reviewing Court for each and every defamation case tried in every state Court.

The *Firestone* case was reversed on other grounds but the majority, speaking through Mr. Justice Rehnquist, at pages 457 and 458, stated that the issue of the truth of the Time article was submitted to the jury and that by returning a verdict for the Respondent (Firestone), the jury necessarily found that the identity of meaning which the Defendant had claimed did not exist.

In effect, the Court has held that the defense of truth is an issue of fact to be determined by the trier of fact.

The Petitioner urges that under the holding in *Beckley v. Hanks,* 389 U.S. 81 (1967), the failure of the reporter in the case at bar to investigate the truth or falsity of the defamatory material did not present a jury question. But this Court has acknowledged that in determining the outer limits of the "knowing or reckless disregard" standard and what evidence constitutes a reckless disregard, each case will have to be judged upon its own facts and merits. *Monitor Patriot Co. v. Roy,* 401 U.S. 265 (1971). No hard, fast rules are readily ascertainable as urged by the Petitioner herein. Failure to properly investigate was one

of the grounds upon which the Court upheld the judgment for the Plaintiff in the *Butts* case. At page 169, the Court said:

> "The slipshod and sketchy investigatory techniques employed to check the veracity of the source and the inferences to be drawn from the few facts believed to be true are detailed at length in the opinion of Mr. Justice Harlen. Suffice it to say that little investigative effort was expended initially, and no additional inquiries were made even after the editors were notified by Respondent and his daughter that the account to be published was completely untrue. Instead, the Saturday Evening Post proceeded on its reckless course with full knowledge of the harm that would likely result from publication of the article." (This is from a concurring opinion of Chief Justice Warren.) (Emphasis added).

The jurors in the case at bar who returned an eleven to one verdict in favor of the Plaintiff were unimpressed by the testimony of the Defendant, Harris, to the effect that he gleaned his material for this defamatory story from two one-sided telephone conversations.

In *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971) a case where the Justices could not reach a majority decision, the dissenting opinion of Justice Harlen joined by Justices Marshall and Stewart addressed the issue of Appellate review. The Opinion beginning at page 62 states:

> ". . ., the principal failing of the plurality opinion is its inadequate appreciation of the limitations imposed by the legal process in accomodating the tension between the state libel and federal constitutional protections given to freedom of speech and press."

and continuing at page 63:

> "Once the evident need to balance the values underlying each is perceived, it might seem, purely as an abstract matter, that the most utilitarian approach would be to scrutinize carefully jury verdict in every libel case in order to ascertain whether the final judgment leaves fully protected whatever First Amendment values transcend the legitimate state interest in protecting the particular Plaintiff who prevailed. This seems to be what is done in the plurality opinion. But we did not embrace this technique in *New York Times*, supra. Instead as my brother Marshall observes, *we there announced a rule of general application, not ordinarily dependent for its implementation upon a case by case examination of trial court verdicts.*" (Emphasis added).

In the State of Oklahoma, the verdict of the jury is conclusive of all disputed facts and all conflicting statements, and where there is any competent evidence reasonably tending to support the verdict of the jury, the Supreme Court will not disturb the judgment based upon that verdict. *Wat Henry Pontiac v. Pitcock*, supra; *Henslee v. Monks, et al.*, Okl., 571 P.2d 440 (1977).

The United States Supreme Court has reaffirmed time and again that the question of truth and of actual malice is one for the jury. Truth and malice were found to be a question for the jury in the case of *Time, Inc. v. Hill*, 385 U.S. 374 (1967). An extreme departure from standards of investigation and reporting ordinarily adhered to by responsible publishers and the question of punitive damages were held to be proper questions for the jury in *Curtis Publishing Company v. Butts*, 388 U.S. 130, 18 L.Ed.2d 1094, 87 S.Ct. 1975 (1967).

The question of malice and good faith were held to be questions for the jury to resolve in the case of *St. Amant v. Thompson,* 390 U.S. 727 (1968). Because the trial judge himself resolved issues of publication and falsehood, the lower Court was reversed in the case of *Ocala Star-Banner Co. v. Damron,* 401 U.S. 295 (1971). Reckless disregard for the truth and vicarious liability were deemed proper questions for the jury in *Cantrell v. Forest City Publishing Co.,* 419 U.S. 245 (1974). Truth was found to be a proper result for the jury in *Time, Inc. v. Firestone,* supra.

CONCLUSION

The Respondent respectfully submits to this Court that the opinion heretofore rendered by the Oklahoma Supreme Court in this case is a proper resolution of the controversy and should be allowed to stand. The opinion as written does not violate any of the constitutional mandates of the United States Constitution or the Oklahoma Constitution. The Defendants were accorded every constitutional protection. It should be noted by this Honorable Court that the instructions in this case were heavily weighted in favor of the Defendants. For example, the "actual malice" instruction was given no less than six times and actual malice was defined no less than three times for the benefit of the jurors. They were also instructed that the Defendants had to publish with serious doubts as to the truth of the article before the Plaintiff could recover. The "serious doubt" instruction is found twice in the instructions.

There could not be a case tried in the State of Oklahoma where the Defendants were accorded more protection of their First Amendment rights than in the case at bar.

This case strikes a constitutional balance between First and Fourteenth Amendment rights on the one hand and

the rights of public officials who are defamed on the other. The *New York Times* standard was applied accurately and consistently throughout the case.

WHEREFORE, the Respondent respectfully prays that the United States Supreme Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

KEITH MYERS
(Counsel of Record)
MYERS, MOLLISON & WEBER
Suite 400, NBC Building
Altus, Oklahoma 73521
405-482-1975
Attorney for Respondent

October, 1980